

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA**

DOCKET 2020-242-E

IN RE:

| | | |
|-----------------------------|---|------------------------------|
| Enrique McMilion, Jr., |) | |
| Complainant/Petitioner, |) | |
| |) | |
| v. |) | DUKE ENERGY CAROLINAS, LLC’S |
| |) | ANSWER AND MOTION TO |
| |) | DISMISS COMPLAINT |
| Duke Energy Carolinas, LLC, |) | |
| Defendant/Respondent. |) | |
| _____ |) | |

Pursuant to S.C. Code Ann. § 58-27-1990, S.C. Code Ann. Regs. 103-829 and 103-352, and applicable South Carolina law, respondent, Duke Energy Carolinas, LLC (“DEC” or the “Company”) hereby answers the complaint filed in the above-referenced proceeding and moves the Public Service Commission of South Carolina (“Commission”) to dismiss the above-captioned matter on the following grounds: (1) the doctrine of *res judicata* bars the Complaint inasmuch as this is Mr. McMilion’s fourth complaint before the Commission regarding the same subject matter; (2) this is a predicament of Mr. McMilion’s own making because he has failed to avail himself of the Manually Read Meter option; and (3) the Complaint makes no allegation that the Company has violated any statute, rule, regulation or order administered or issued by the Commission as required by S.C. Code Ann. Regs. 103-824—there are therefore no facts at issue in the Complaint that would entitle Complainant to relief from the Commission—and a hearing is not required in this case for protection of substantial rights.

The Company also requests that the filing deadlines for all parties and the hearing date be held in abeyance until this motion is resolved.

On October 15, 2020, Mr. McMilion filed a “motion for discovery.” Consistent with S.C.R.C.P. 26(a), taking into account the needs of this case and the unreasonable and unnecessary burden of responding to discovery at this early stage of the proceeding—particularly in light of the three dismissed complaints dealing with the same subject matter as that in this proceeding—the Company requests that it not be required to respond to Complainant’s “motion for discovery” until after the Commission has ruled on the Company’s motion to dismiss the Complaint.

In support of its motion, DEC shows the following:

BACKGROUND

This is the fourth complaint related to Mr. McMilion’s aversion to smart meters since December 2018. The first three complaints were dismissed.¹ Despite being aware of the option to have a manually read meter installed as provided for in the Commission-approved Manually Read Meter Rider, Mr. McMilion has neglected or failed to avail himself of that option.

A. The First Complaint, Docket No. 2018-379-E

In the Complaint filed in Docket No. 2018-397-E on December 3, 2018 (the “First Complaint”), Mr. McMilion made various allegations related to the Company’s use of smart meters and asked that the Company leave his then-existing meter in place until the matter was adjudicated. The Company filed a motion to dismiss on the grounds that the Complaint failed to adequately allege any violation of a Commission-jurisdictional statute or regulation, and because a hearing was not necessary for the protection of substantial rights. The Commission gave Mr. McMilion an opportunity to file testimony, which he declined or failed to do. The Commission dismissed the Complaint in Order No. 2019-427, issued on June 12, 2019.

¹ Order No. 2019-427, Docket No. 2018-379-E (June 12, 2019); Order No. 2019-686, Docket No. 2019-230-E (Sept. 25, 2019); and Order No. 2020-342, Docket No. 2019-331-E (June 30, 2020).

B. The Second Complaint, Docket No. 2019-230-E

Less than a week after the Commission's dismissal of the First Complaint, Mr. McMilion filed a Complaint in Docket No. 2019-230-E on June 18, 2019 (the "Second Complaint"). In the Second Complaint, Mr. McMilion again made various allegations related to the Company's use of smart meters and asked that the Company leave his then-existing meter in place until the matter was adjudicated, and requested copies of the Company's tariffs. The Company filed a motion to dismiss on the grounds that the Complaint failed to adequately allege any violation of a Commission-jurisdictional statute or regulation, and because a hearing was not necessary for the protection of substantial rights. Included with its Motion to Dismiss were copies of the Company's applicable tariffs. The Commission dismissed the Complaint in Order No. 2019-427 on June 12, 2019. Mr. McMilion thereafter sought rehearing, which the Commission denied in Order No. 2019-724, issued on October 9, 2019.

C. The Third Complaint, Docket No. 2019-331-E

Again, less than a week after the Commission denied Mr. McMilion's request for rehearing of the First Complaint, Mr. McMilion filed a Complaint in Docket No. 2019-331-E on October 15, 2019 (the "Third Complaint"). In the Third Complaint, Mr. McMilion yet again made various allegations related to the Company's use of smart meters. The Company filed a motion to dismiss on the grounds that the Complaint failed to adequately allege any violation of a Commission-jurisdictional statute or regulation, and because a hearing was not necessary for the protection of substantial rights. The Commission dismissed the Complaint in Order No. 2020-342 on June 30, 2020 on various grounds, including on the basis of *res judicata* inasmuch as the complaint was "the third complaint raised by the same individual, against the same utility, arising from the same transaction or occurrence." Order No. 2020-342 at 9-10, Docket No. 2019-331-E (June 30, 2020).

Mr. McMilion thereafter sought rehearing, which the Commission denied in Order No. 2020-519, issued on August 7, 2020.

D. The Fourth Complaint, Docket No. 2020-242-E

In a letter filed by the Company on June 3, 2020 in Docket No. 2019-331-E, filed in response to an email filed by Mr. McMilion, the Company stated that it would “temporarily suspend its attempts to exchange Mr. McMilion’s electric meter” while the service disconnection moratorium related to the COVID-19 pandemic was in effect. The moratorium was lifted on October 1, 2020, and the Company again made contact with Mr. McMilion as related to his out-of-date meter. On October 8, 2020, Mr. McMilion filed the instant complaint, his fourth complaint related to smart meters (the “Fourth Complaint”).

Based upon Mr. McMilion’s representations that he would not prevent the Company’s access to the meter serving his premises, the Company took action to, and was successful in, replacing his out-of-date meter with an Advanced Metering Infrastructure (“AMI”) meter on October 12, 2020. Mr. McMilion was given notice of the intent of the Company to replace the meter, and has been given ample opportunity to enroll in the Company’s Manually Read Meter Rider, which Mr. McMilion has chosen not to do.

The Fourth Complaint alleges that the Company is “tak[ing] the private property of airspace” and the “intellectual private property of how, when, why, and for how long my family and I choose to use an electrical device,” and that such amounts to the Company violating the Fifth Amendment of the U.S. Constitution. The Complaint also appears to allege that the Commission is taking its “intellectual private property” and somehow giving it to the Company without just compensation to Mr. McMilion.

As described in its October 10, 2016 filing in Docket No. 2016-354-E, the Company has deployed Advanced Metering Infrastructure (“AMI”), including smart meters, to its customers in South Carolina. The transmission of electricity usage data via smart meters enables a host of features that benefit customers. Such benefits include giving customers more information about how they use energy,² and laying the groundwork for programs that allow customers to stay better informed during outages, control their due dates, avoid deposits, be reconnected faster, and better understand and take control of their energy usage, and ultimately, their bills.³ Acknowledging the benefits of smart meters, the Commission has required that its regulated investor-owned electric utilities make smart meters available to all customers, as well as implement a communications plan to inform all customers of the availability and capabilities of smart meters, and how customers may use those capabilities to better manage their power requirements.⁴

All meters used by the Company are tested to confirm that they are in compliance with Federal Communications Commission (“FCC”) rules and guidelines, which set exposure limits for all types of devices that emit radio frequencies. The FCC standards for intentional and unintentional radio emissions and safety related to radio frequency exposure, Parts 1 and 2 of the FCC’s Rules and Regulations (47 C.F.R. §§ 1.1307(b), 1.1310, 2.1091, 2.1093), govern the certification and design of communicating meters and other devices such as cordless phones, remote control toys, personal computers, televisions, vacuum cleaners, among others. All meters used by the Company comply with these standards.

² Order No. 2016-791 at 1, Docket No. 2016-354-E (Nov. 17, 2016).

³ Order No. 2016-489 at 2, Docket No. 2016-240-E (July 12, 2016).

⁴ Order No. 2007-618 at 4, Docket Nos. 2005-385-E and 2005-386-E (Aug. 30, 2007).

A small number of customers had reservations about the installation of smart meters. Customers who objected to the installation of a smart meter were temporarily bypassed during the deployment and were served by legacy automatic meter reading (“AMR”) meters during that time. AMR meters collect and transmit customers’ kWh usage via a radio frequency signal (900 MHz radio frequency) that is read by equipment installed in the Company’s trucks as the meter readers drive by the location. As more smart meters are deployed, routes for reading AMR meters are being discontinued. For that reason, and to accommodate the limited number of customers’ concerns related to smart meter deployment, DEC proposed—and the Commission approved—the Manually Read Meter Rider.

Under the Manually Read Meter Rider, rather than electricity usage being communicated to the Company via radio frequency, the meter is instead read manually by a meter reader physically visiting the premises. As acknowledged in the Company’s application in Docket No. 2016-354-E, there are additional costs to provide this manual service under that rider, including initial setup costs and ongoing costs related to reading the meter. While customers receiving service under the MRM Rider are required to pay those additional costs of providing this service, the Rider permits customers with medical issues to opt for a manually read meter without having to pay the associated fees. This medical opt-out option was approved by the Commission through Order No. 2019-429, Docket No. 2016-354-E, issued on June 12, 2019.

ANSWER

DEC denies all allegations contained in the Complaint not otherwise expressly admitted herein. The Company specifically denies: (1) that DEC has taken Mr. McMilion’s “private property of airspace”; (2) that DEC has any knowledge of “how, when, why, and for how long”

Complainant uses an electrical device; (3) or that Mr. McMilion's electricity usage information constitutes "intellectual private property."

MOTION TO DISMISS

DEC requests that the Commission dismiss the Complaint on various independent grounds. First, inasmuch as this is the fourth complaint filed by Mr. McMilion related to the same subject matter as was ruled upon by the Commission in the previous three complaint proceedings, the Complaint is barred by the doctrine of *res judicata*. Second, despite ample opportunity to enroll in the Manually Read Meter rider, Mr. McMilion has failed to avail himself of that option, instead preferring to make a series of groundless filings with the Commission. This conduct should not be rewarded. Third, and importantly, the Complaint should be dismissed because it makes no allegation that the Company has violated any statute, rule, regulation or order administered or issued by the Commission as required by S.C. Code Ann. Regs. 103-824—there are therefore no facts at issue in the Complaint that would entitle Complainant to relief from the Commission—and a hearing is therefore not required for the protection of substantial rights.

A. The Complaint is barred by the doctrine of res judicata.

Mr. McMilion has now filed four complaints since December 2018, each addressing the Company's use of a smart meter at his premises. The doctrine of *res judicata* serves to prevent this exact kind of behavior:

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999); *Rogers v. Kunja Knitting Mills, U.S.A.*, 336 S.C. 533, 520 S.E.2d 815 (Ct.App.1999). . . . "*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. **Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.**" James F. Flanagan, South Carolina Civil Procedure 642 (2d ed.1996).

Nelson v. QUG of South Carolina, Inc., 354 S.C. 290, 304, 580 S.E.2d 171 (S.C. App. 2003) (emphasis added). Pursuant to the doctrine of *res judicata*, “[a] litigant is barred from raising any issues which were adjudicated in the former suit **and any issues which might have been raised in the former suit.**” *Hilton Head Center of South Carolina, Inc. v. Pub. Serv. Comm’n of South Carolina*, 362 S.E.2d 176, 294 S.C. 9 (S.C. 1987) (*Hilton Head v. PSC*).

“In order to establish a plea of *res judicata*, three elements must be established: (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the former suit.” *Sealy v. Dodge*, 347 S.E.2d 504, 289 S.C. 543 (S.C. 1986). In this case, there is no dispute that the identity of the parties is the same and that the previous three proceedings initiated by Mr. McMilion as to these issues were finally and formally adjudicated. As to the second element, while the Complaint preemptively asserts that *res judicata* does not apply because “[t]his is a new and unrelated complaint,” such is facially untrue. The substance of this complaint—Mr. McMilion’s aversion to smart meters—is identical to that of the three complaints that came before it. Further, consistent with *Hilton Head v. PSC*, Mr. McMilion’s new spin on his old complaints, namely his allegations about “airspace,” do not prevent the application of *res judicata* because his new theory “might have been raised” one or more of the previous three proceedings. Indeed, “*res judicata* may apply even though the plaintiff in the first suit proceeded under a different legal theory.” *Plott v. Justin Enterprises*, 649 S.E.2d 92, 95, 374 S.C. 504 (S.C. App. 2007); *see also Aliff v. Joy Mfg. Co.*, 914 F.2d 39 (4th Cir. 1990) (“The law . . . is well established that *res judicata* may apply even though the plaintiff in the first suit proceeded under a different legal theory.”).

The Commission adopted *res judicata* as an additional ground warranting dismissal of Mr. McMilion’s Third Complaint. As articulated by the Commission in that order

The complaint currently before us is the third complaint raised by the same individual, against the same utility, arising from the same transaction or occurrence.

We have granted the Complainant multiple extensions of time, allowed him to make extra filings for our consideration, and extended other courtesies to him. Following dismissal of Docket No. 2018-379-E, we arguably could have found that Docket No. 2019-230-E was barred by *res judicata*, but we did not. Now, after having twice previously dismissed complaints arising from the same transaction or occurrence, we adopt *res judicata* as an additional ground warranting dismissal of the complaint.

Order No. 2020-342 at 9-10, Docket No. 2019-331-E (June 30, 2020). On rehearing, the Commission unequivocally affirmed its prior ruling:

Mr. McMillion's request for rehearing must be denied because of the simple fact that the same facts and circumstances have been presented and adjudicated adversely to Mr. McMillion in three separate Commission Dockets: Docket Nos. 2018-379-E, 2019-230-E and 2019-331-E. As we held in Order No. 2020-342, the legal doctrine of *res judicata* bars subsequent litigation between identical parties where the claims arise out of the same transaction or occurrence that was the subject of the prior litigation between those same parties. The doctrine bars litigants from raising any issues which were adjudicated in the prior action as well as any issues which might have been raised in the prior action. The Complaint in the present Docket is the third complaint raised by the same individual, against the same utility, arising from the same transaction or occurrence. We held in Order No. 2020-342 that the doctrine of *res judicata* applies, and Mr. McMillion's request for rehearing has not convinced us otherwise. **It is clearly time for this litigation to end.**

Order No. 2020-519 at 2-3, Docket No. 2019-331-E (Aug. 7, 2020) (emphasis added). In spite of these findings and the Commission's intent to bring an end to Mr. McMillion's litigation related to smart meters, he has filed yet another complaint.

Mr. McMillion's options have been explained to him both in the Company's interactions with Mr. McMillion and in the course of the past three proceedings, in which the Company has made 15 filings and Mr. McMillion has made 25 filings. This series of proceedings, dealing with the same subject matter, has cost and continues to cost an undue and extraordinary amount of time and expense for the Company and the Commission, which is ultimately passed on to customers.

B. This is a problem of Complainant's own making as Complainant has failed to avail himself of the Manually Read Meter option.

While the Complaint makes a series of largely inscrutable arguments about airspace and intellectual property, and while this is the fourth complaint proceeding initiated by Mr. McMilion as related to smart meters, the use of a smart meter at Mr. McMilion's premises is the product of his own choice. The Company has repeatedly offered the Manually Read Meter option to Mr. McMilion since it sent him notification of the option by letter on April 5, 2018, and—in the two and a half years since that time—Mr. McMilion has repeatedly declined to avail himself of that option.

“A party [allegedly] injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances” *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 285, 573 S.E.2d 830, 838 (Ct. App. 2002). Rather than show “ordinary prudence” and opt out of having a smart meter, Mr. McMilion makes filing after filing with the Commission, using up the Commission's and the Company's time and resources. While Mr. McMilion purports to represent the interests of “all South Carolina citizens,” complaints “on principle” are insufficient to warrant the consideration of this Commission. Mr. McMilion should not be rewarded for failing to avail himself of the Manually Read Meter option, and his Complaint should be dismissed.

C. The Complaint should be dismissed because it does not allege a Commission-jurisdictional violation.

The Commission's regulations require that complaints allege “anything done or omitted to be done by any person under the statutory jurisdiction of the Commission in contravention **of any statute, rule, regulation or order administered or issued by the Commission.**” S.C. Code Ann. Regs. 103-824 (emphasis added). This basic standard—that the Complaint arise from a Commission-jurisdictional statute, rule, regulation, or order—has not been met in this case.

Because the Company has not violated any “statute, rule, regulation, or order administered or issued by the Commission,” there are no facts at issue in the Complaint that would entitle Complainant to relief from the Commission

The Complaint alleges that DEC is taking Complainant’s “private property of airspace” and his “intellectual private property” without just compensation, relying upon the Fifth and Fourteenth Amendments of the U.S. Constitution. The Complaint’s constitutional claims fail, however, because DEC is not a state actor. As a limited liability company, the Company is a private actor, and no state action is conducted in the Company’s use of smart meters.⁵ In *Benlian*, the installation and utilization of smart meters was actually required by state law, and customers could not opt out. Nevertheless, as the Court in *Benlian* points out, even detailed regulation does not equate to state action,⁶ and the Court determined that the provision of electricity using smart meters is a business activity and not state action. In this case, there is no state law requiring the installation of smart meters, and customers may opt out of receiving service from a smart meter by simply enrolling in the MRM Rider. It is therefore abundantly clear that no state action is conducted in the Company’s deployment of smart meters.

The Commission recently agreed with this view as related to the claims made by Mr. McMillion’s in the Second Complaint:

First, Duke is not a state actor, and Complainant therefore has no constitutional right to privacy that is enforceable against Duke. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Supreme Court of the United States rejected the argument now advanced by Complainant. In that case, the Court held that a

⁵ See *Benlian v. PECO Energy Corp.*, No. CV 15-2128, 2016 WL 3951664, at *7 (E.D. Pa. July 20, 2016) (“The installation of smart meters, and the provision of electricity to customers such as Benlian, is a business activity, and not a state function or a state action.”) (*Benlian*).

⁶ *Id.* at *6 (citing *Crissman v. Dover Downs Entm’t Inc.*, 289 F.3d 231, 243 (3d Cir. 2002); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)).

Pennsylvania electric utility with the exclusive right to provide power to its service territory was not a state actor.

Order No. 2019-686, Docket No. 2019-230-E (Sept. 25, 2019). As in *Benlian*, the U.S. Supreme Court found in *Jackson v. Metropolitan Edison Co.* that the state’s regulation of a utility was “not sufficient to connect the [state] with [the utility’s] action so as to make the latter’s conduct attributable to the State for purposes of the Fourteenth Amendment.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974) (*Jackson*). Relying upon *Jackson* in another smart meter complaint proceeding, the Commission found that the complainant’s claims “can only be raised against state actors – which DEC is not” and therefore the claim must be denied. Order No. 2020-562 at 2, Docket No. 2020-147-E (Aug. 24, 2020). The Company believes that this rationale applies equally in this fourth complaint proceeding brought by Mr. McMilion. The Supreme Court’s pronouncements on this issue also work to defeat the Complaint’s claim that the Commission is somehow the entity doing the taking. Per *Jackson*, the Commission’s regulation of the Company is wholly insufficient to attribute to the Commission the Company’s use of smart meters.

Even assuming the Company is a state actor, and even assuming it is somehow taking Mr. McMilion’s airspace or intellectual property, the Commission has not been statutorily authorized to grant him compensation. So taking his arguments to their illogical end, were DEC somehow condemning and taking for its own possession Complainants’ airspace and intellectual property—which the Company finds facially absurd—the Commission does not have the authority to grant Mr. McMilion any “just compensation” that might be due under such a claim:

It is elementary law that administrative agencies are creatures of statute and their power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim. . . . Any reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of the power.

Calhoun Life Ins. Co. v. Gambrell, 245 S.C. 406, 408 (1965) (internal citations omitted). As creatures of statutes, regulatory bodies such as the Commission “have only the authority granted them by the legislature.” *Responsible Economic Development v. South Carolina Dep’t of Envir. Control*, 371 S.C. 547, 553 (2007). The Company is aware of no statutory provision that would permit the Commission to award Mr. McMilion compensation for any alleged taking by the Company. Because Complainant’s claims do not lie against the Company, a hearing is not required for the protection of substantial rights.

CONCLUSION

This Fourth Complaint is barred by the doctrine of *res judicata*; it is the product of Mr. McMilion’s own failure to enroll in the Manually Read Meter Rider; the Complaint makes no allegation that the Company has violated any statute, rule, regulation or order administered or issued by the Commission as required by S.C. Code Ann. Regs. 103-824; and a hearing is not required for protection of substantial rights. For these reasons, the Company requests the following relief from the Commission:

1. That the Complaint be dismissed with prejudice;
2. That the filing deadlines for all parties and the hearing date be held in abeyance until this motion is resolved; and
3. That the Company not be required to respond to Complainant’s “motion for discovery” until after the Commission has ruled on the Company’s motion to dismiss the Complaint.

Respectfully submitted this 2nd day of November, 2020.

Katie M. Brown, Counsel
Duke Energy Carolinas, LLC
40 West Broad Street, Suite 690
Greenville, SC 29601
Telephone (864) 370-5045
Katie.brown2@duke-energy.com

s/ Samuel J. Wellborn

Frank R. Ellerbe, III (SC Bar No. 01866)
Samuel J. Wellborn (SC Bar No. 101979)
ROBINSON GRAY STEPP & LAFFITTE, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
fellerbe@robinsongray.com
swellborn@robinsongray.com

Attorneys for Duke Energy Carolinas, LLC